Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware, and Eastern Shore of Maryland, and its affiliated Local, Carpenters Union Local 2012 *and* Forcine Concrete & Construction Co., Inc. Case 04–CB–010520

May 15, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On May 18, 2011, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Edward J. Bonnett Jr., Esq., for the General Counsel.
Stephen J. Holroyd, Esq. (Jennings Sigmond), of Philadelphia, Pennsylvania, for the Respondent.
Marc Furman and *Melissa Angeline, Esqs. (Cohen Seglias Pallas Greehall & Furman, PC),* of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 28, 2011. Forcine Concrete and Construction Co., Inc. (Forcine), the Charging Party, filed the charge on July 28, 2010, and the General Counsel issued the complaint on January 20, 2011.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party I make the following

FINDINGS OF FACT

I. JURISDICTION

Forcine Concrete & Construction Co., Inc., a corporation, operates a concrete construction business with a facility in Malvern, Pennsylvania. During 2010, Forcine purchased and received goods valued in excess of $50,000 directly from points outside the State of Pennsylvania. I find that Charging Party Forcine is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Metropolitan Regional Council of Carpenters (hereinafter MRC) and its affiliated local, Carpenters Local 2012, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel's complaint alleges that Respondent MRC violated Section 8(b)(1)(A) of the Act by entering on a construction site in Rydal Park, Pennsylvania, and interrogating Charging Party Forcine's employees at that site about their immigration status and videotaping these interrogations. The complaint also alleges that Carpenters Local 2012 violated Section 8(b)(1)(A) by editing the videotape taken by MRC and posting the edited video on Local 2012's Facebook page and on YouTube.

The Union initiated a salting campaign aimed at getting Forcine Concrete, a nonunion concrete construction company, to hire some of its members including some of its council representatives (business agents) and organizers in September 2009. Forcine did not hire these applicants. The Union filed unfair labor practice charges alleging that Forcine had violated the Act in refusing to consider its members for hire and refusing to hire them. These charges were settled prior to instant hearing.

On June 4, 2010, four full-time employees of the Union, Business Agent or Council Representative Robert Burns, Organizers William Dyken, Michael Griffin, and Richard Rivera went to a jobsite in Rydal Park, Pennsylvania, where Forcine was working as a subcontractor in the construction of an addition to the Presbyterian Inspired Living project. The general contractor at the site was Whiting-Turner Company. On June 4, 2010, Forcine had 12–14 employees on this jobsite who were installing reinforcing steel bars.

Burns, Dyken, Griffin, and Rivera wore matching blue polo shirts, khaki pants, and white hardhats. All appeared to be wearing some sort of uniform. However, their clothing did not identify them as union representations or give any indication who or what they represented.

Rivera, who speaks Spanish, as well as English, carried a video recorder. The four entered the jobsite without asking anyone for permission and climbed a ladder to the second floor where a number of Forcine employees were working.

With Dyken acting as spokesman and Rivera translating from Spanish to English, the four announced they were doing an inspection and began to ask Forcine's employees questions. Most of the questions were directed to several Hispanic employees, and primarily concerned their immigration status, but also covered other subjects, such as how long they had worked for Forcine, how they were hired, and how they were being paid. The questioning continued for almost 20 minutes until

[1] There is no record evidence to support the judge's findings that "[i]t is reasonably likely that Forcine employees" and "other non-native Hispanic employees" would become aware of the Respondent's video on YouTube and that they would watch the video. Accordingly, in dismissing the complaint, we do not rely on these speculative statements, nor do we rely on the judge's further speculation concerning how employees would have been affected. Nor is there evidence that the Forcine employees actually became aware, at any time, of their questioners' union affiliation.

Thomas Romano, the senior Forcine representative at the jobsite, asked the four for identification. When he did so, the four climbed down the ladder to ground level and continued their interrogation of at least one other Hispanic Forcine employee working at ground level. Rivera videotaped the interrogations. The DVD of the union representatives' presence on the site, most of which shows them interrogating Forcine employees, runs for 18 minutes and 10 seconds (Jt. Exh. 2). There is no credible evidence in this record regarding the immigration status of any of Forcine's employees.

At no time did the four union representatives identify themselves or mention the Union or Unions. They made no effort to state by what authority they were on the jobsite or by what authority they were interrogating Forcine's employees. The DVD of the interrogations taken by organizer Rivera establishes that the questioning was done in a very intimidating manner. The union agents bullied the employees they interrogated. It is also apparent that the four union representatives prevented the Forcine employees from working while they were questioning them.

In this regard, I note that parties stipulated that, "for the duration of the questioning, the employees being questioned by MRC agents were not working" (Jt. Exh. 1, p. 2, # 12). This is true only in the literal sense. However, these employees were not on break and were not working during their interrogations because the MRC agents interfered with their work activities. I draw this inference in part because the video at times shows employees in the background who were working while the interrogations were taking place. Moreover, nothing in the video or elsewhere in the record suggests that the interrogated employees were not supposed to be performing work during the period MRC agents were questioning them.

Furthermore, MRC's agent, Dyken, at one point told Forcine employees that he and the other "inspectors" would leave the second floor deck and return in a half-hour. Dyken told them that he wanted to see documentation of their immigration status at that time. This would have required some employees to stop working and leave the second floor on which they were working to obtain such papers, if they had them.

The MRC submitted the unedited videotape of its June 4 visit to Forcine's jobsite to the NLRB in an effort to show that Forcine had hired employees while it was refusing to hire MRC applicants.

The MRC edited the videotape and put a 4-minute 24-second version on YouTube with commentary. The video was viewed on YouTube 28,961 times and there were 211 comments posted about the edited video. On July 12, 2010, Carpenters Local 2012 linked the YouTube video to its Facebook page.

Analysis

Section 8(b)(1)(A) states that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Those Section 7 rights are that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

I find that the union representatives restrained and coerced Forcine's employees when they entered the jobsite on June 4, 2010, and interrogated them about their immigration status and other matters. What is a more difficult question is whether the Union restrained and coerced these employees in the exercise of their Section 7 rights, thus violating the National Labor Relations Act (the Act).

Although the Union's conduct may violate trespassing and other laws, I conclude that it does not violate the Act. Forcine's employees were not exercising any right guaranteed by Section 7 of the Act when interrogated by the Union's agents. Section 7 guarantees the right to engage in certain conduct and to refrain from certain conduct. In order to refrain from conduct, I conclude that employees must be presented with a choice as to whether to engage in activity or not. That is not the case in this matter. I conclude that Section 7 is not so broad as to protect simply working in situations in which the employee is not confronted with a choice between engaging in protected activity or not.

In *Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686 (2001), the Board found that the union violated the Section 7 rights of employees who were hired as replacements for the union strikers, when it videotaped their license plate numbers. The only Section 7 activity that those employees had engaged in was accepting a job with a nonunion employer, as is the case with Forcine's employees. However, the employees were confronted with a choice by the Union's conduct; whether or not to continue working in the face of union activity which called for at least their passive support in honoring the Union's picket line.

A similar case is *Electrical Workers Local 98 (MCP Services)*, 342 NLREB 740, 752 (2004). There, the Board found that the respondent union violated Section 8(b)(1)(A) when a union organizer used his vehicle to block an employee, Vincent Ponticello, from operating his forklift. As in the Local 890 case, Ponticello knew who was preventing him from working and why. He had met with union officials previously and they had asked him to support their organizing effort. The only protected activity that Ponticello was engaged in at the time of the union's conduct was performing work for his nonunion employer. However, he would have reasonably connected the union's conduct to its solicitation of his support. Thus, the Electrical Workers were coercing Ponticello in deciding whether or not to support their organizing campaign.

The General Counsel also cites *Electrical Workers Local 48 (Oregon-Columbia Chapter of National Electrical Contractors Assn.)*, 342 NLRB 101 (2004). In that case, the Board found a violation of Section 8(b)(1)(A) because the union operated its hiring hall in such a manner as to reward members who participated in its salting campaigns, to the detriment of those who did not. This manner of operation clearly had the tendency to coerce members into engaging in union activity from which they

might otherwise have refrained, and is thus not relevant to the situation confronting Forcine's employees.

Still another case cited by the General Counsel is *Electrical Workers Local 98 (TRI-M Group, LLC)*, 350 NLRB 1104 (2007). In that case, union pickets impeded the ability of an employee of a nonunion electrical contractor from dumping a load of debris into a dumpster with a backhoe for a half-hour. Although not specifically addressed, I infer that the union did so to coerce the employee into assisting it in its labor dispute with his employer, thus also making the case distinguishable from the instant one.

The interrogations of Forcine's employees could only have been calculated to discourage them from working for Forcine and had a reasonable tendency to do so. Regardless of whether or not Forcine's employees were in the United States legally, the conduct of the Respondent had a reasonable tendency to restrain them from continuing their employment with Forcine. However, the Union's conduct in this case did not present Forcine's employees with a choice between engaging in protected activity or not.

I also conclude that the Union did not violate Section 8(b)(1)(A) by the posting of the edited version of the DVD on YouTube and by Local 2012 linking the YouTube posting to its webpage. It is reasonably likely that Forcine employees would become aware that the video in which they were portrayed was posted on YouTube and that they would visit the YouTube site. It is also reasonably likely that other nonnative Hispanic employees would see the YouTube video. If so, they would see the strong feelings incited by video and would likely be restrained or inhibited from continuing to work at Forcine jobsites or for other nonunion contractors. By viewing the YouTube video, they would learn, if they did not already know, that it was the Union performing the interrogations on June 4. However, as with the interrogation itself, the postings on YouTube and Facebook did not present employees with a choice of engaging in protected activity or refraining from engaging in protected activity.

There is no evidence that any of Forcine's employees or other nonunion employees viewing the YouTube video and Facebook page were aware of a labor dispute between MRC and Forcine. There is no evidence that any of these employees were aware of the Respondent's salting campaign or the unfair labor practice charges filed by the MRC. Thus, nonunion employees were not being coerced or restrained with respect to supporting the Union in these matters.

CONCLUSION OF LAW

The Respondent Union in interfering with employees' work at Forcine's nonunion jobsite and interrogating them about their immigration status and other matters and videotaping the interrogations, did not engage in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue that following recommended[1]

ORDER

The complaint is dismissed.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.